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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S COMPLIANCE
WITH SECTION 271 OF THE
TELECOMMUNICATIONS ACT OF 1996

DOCKET NO. T-00000A-97-0238

NOTICE OF FILING

The Arizona Corporation Commission Staff ("Staff") by its undersigned attorneys, hereby files its Supplemental Report on Checklist Item 3.

RESPECTFULLY SUBMITTED this 5th day of November 2001.

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**IN THE MATTER OF QWEST CORPORATION'S
SECTION 271 APPLICATION**

ACC Docket No. T-00000A-97-0238

SUPPLEMENTAL REPORT ON QWEST'S COMPLIANCE

With

**CHECKLIST ITEM: NO. 3 - POLES, DUCTS, CONDUITS
AND RIGHTS-OF-WAY**

NOVEMBER 5, 2001

I. FINDINGS OF FACT

A. PROCEDURAL HISTORY

1. On March 9, 2001 in Decision No. 63419, the Arizona Corporation Commission approved Checklist Item 3 - Poles, Ducts, Conduits and Rights-of-Way.

2. In the Conclusions of Law portion of the approved Order, Qwest¹ was required to update its SGAT language agreed to in other region Workshops and resolution by the Hearing Division /Commission of the issue of how to treat issues arising in other State Workshops which the parties would like to bring back to Arizona after the record has closed.

3. On March 26, 2001, the Hearing Division of the Commission issued a procedural order indicating that a party may request to supplement the record in Arizona on a checklist item by filing a brief within 10 business days from the date the issue is first declared at impasse in another jurisdiction. Other parties were ordered to file replies to the request within 7 business days, and Staff shall file a report, including its procedural and substantive recommendations for the resolution for the dispute.

4. On April 9, 2001, AT&T Communications of the Mountain States, Inc. ("AT&T") and WorldCom, Inc. ("MCIW") (collectively referred to herein as "Joint Intervenors") filed a request to supplement the record regarding checklist items 3, 7 and 10 with disputed issues raised in other Region workshops.

5. The following issues have been disputed by AT&T and MCIW - access to private landowner/property owner agreements, time for responding to rights-of-way ("ROW") access requests, definitions of ROW and "ownership and control".

B. DISCUSSION

1. Checklist Item No. 3

a. Background

6. Section 271(c)(2)(B)(iii) of the Telecommunications Act of 1996 requires a 271 applicant to provide or offer to provide: "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."

¹ As of the date of this Report, U S WEST has merged with Qwest Corporation, which merger was approved by the Arizona Commission on June 30, 2000. For purposes of this Report, all references to U S WEST have been changed to Qwest.

7. In the *Local Competition First Report and Order*, the FCC interpreted Section 251(b)(4) as requiring nondiscriminatory access to LEC poles, ducts, conduits, and rights-of-way for competing providers of telecommunications services in accordance with the requirements of Section 224.

8. Section 224(f)(1) states that “[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”

9. Notwithstanding this requirement, Section 224(f)(2) permits a utility providing electric service to deny access to its poles, ducts, conduits, and rights-of-way, on a nondiscriminatory basis, “where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.”

10. Section 224(b)(1) authorizes the FCC to regulate the rates, terms, and conditions for pole attachments to ensure that such rates, terms and conditions are reasonable. Under Section 224(c)(1) the FCC’s jurisdiction does not extend to rates terms or conditions or access to poles, ducts, conduits and rights-of-way in any case where such matters are regulated by a State.

11. Pursuant to Section 224(e)(1), the FCC was required within 2 years of the date of enactment of the 1996 Act, to prescribe regulations to implement the provisions of the Act dealing with charges for pole attachments used by telecommunications carriers to provide telecommunications services to ensure that a utility charges just, reasonable and nondiscriminatory rates for pole attachments.

12. The FCC interpreted the requirements of Section 224 governing rates, terms, and conditions for telecommunications carriers’ attachments to utility poles in the *Pole Attachment Telecommunications Rate Order*.²

13. In its *Local Competition First Report and Order*³, the FCC established five rules of general applicability concerning poles, ducts, conduits, and rights-of-way. First, in evaluating a request for access a utility may continue to rely on such codes as the National Electrical Safety Code (“NESC”) to prescribe standards with respect to capacity, safety, reliability, and general engineering principles. Second, Federal requirements, such as those imposed by the Federal Energy Regulatory Commission (“FERC”) and the Occupational Safety and Health Administration (“OSHA”) will continue to apply to utilities to the extent such requirements affect requests for attachments to utility facilities under Section 224(f)(1). Third, the FCC considers State and local requirements affecting pole attachments. Fourth, where access is mandated, the rates, terms, and conditions of

² *In the Matter of Implementation of Section 703(E) of the Telecommunications act of 1996*, 13 FCC Rcd. 6777 (rel. February 6, 1998) (“Pole Attachment Telecommunications Rate Order”).

³ *Implementation of the Local Competition Provision in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 15499 (rel. August 8, 1996), vacated in part and aff’d in part sub nom. *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), overruled in part, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access. Except as specifically provided, the utility must charge all parties an attachment rate that does not exceed the maximum amount permitted by the FCC formula. Fifth, a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services. *Local Competition First Report and Order* at paras. 1151-1153; 1156 and 1157.

14. The FCC in the *BellSouth Louisiana II Order*⁴ specified four elements for establishing a prima facie case for Checklist Item 3:

- a. Evaluating facility requests pursuant to Section 224 of the Act and the *Local Competition First Report and Order*,
- b. Granting competitors nondiscriminatory access to information or facilities availability,
- c. Permitting competitors to use non-[RBOC] workers, and
- d. Compliance with State and Federal rates.

b. CLEC Position

1. Definition of "Ownership and Control"

15. Joint Intervenor argue that Qwest has proposed new definitions of "ROW" and "ownership and control" which are contrary to law and inappropriate.⁵ *Id.* at p. 5. Although Joint Intervenor still have a concern over Section 10.8.1.5 wherein the phrase "ownership or control to do so" means the legal right, as a matter of state law, to "convey an interest in real or personal property", with minor modifications this section would be acceptable. *Id.* at p. 18. Section 10.8.1.5 as revised and proposed by the Joint Intervenor would read as follows:

10.8.1.5 The phrase "ownership or control to do so" means the legal right, as a matter of state law, to convey an interest in real or personal property or to afford the access to poles, ducts, conduits and rights-of-way contemplated by the Act

Id. at p. 19. The recent Multi-state Order also reflects a revised version of Section 10.8.1.5 that is consistent with AT&T's proposal. *Id.*

⁴ *Application of BellSouth Corporation Pursuant to Section 271 of the Communications Act of 1934, as amended to Provide In-Region InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (rel. Oct. 13, 1998) ("*BellSouth Second Louisiana Order*").

⁵ AT&T's and WCom's April 6, 2001 Request to Supplement The Record Regarding Checklist Item 3, 7 and 10.

2. Definition of “Rights of Way” - ROW

16. Second, Joint Intervenors state that Qwest proposed revisions to various sub-sections of SGAT Section 10 which defines Rights of Way (“ROW”) in a manner which is inconsistent with the FCC’s *MTE Order*. *Id.* at p. 17. Specifically, Section 10.8.1.3.1 was revised to state:

10.8.1.3.1 ROW means a real property interest in privately-owned real property, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on such real property; such property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-unit buildings. Within a multi-unit building, a ROW includes a pathway that is actually used or has been specifically designated for use by Qwest as part of its transmission and distribution network where the boundaries of the pathway are clearly defined either by written specifications or unambiguous physical demarcation.

Id. at p. 17-18. ROW, as contemplated by the Act and the FCC is not limited to “real property interests”, as Qwest defines that term. *Id.* Also, Qwest’s definition of ROW in an MDU context is not consistent with the FCC *MTE Order*. *Id.*

3. Access to MDU Agreements

17. In the Colorado workshop on Checklist Item 3, an issue arose concerning Qwest’s provisioning of nondiscriminatory access to ROW. CLECs have disputed Qwest’s claim that the agreements Qwest has entered into with private landowners, at least in the multiple dwelling unit (“MDU”) context, do not convey ROW and, therefore, Qwest has no obligation to satisfy under Section 251 (b)(4). *Id.* at p. 2. CLECs stated that access to these agreements with private landowners/property owners are vital to ascertaining what ROW Qwest owns or controls and the terms and conditions upon which Qwest has been afforded access. *Id.* at p. 3.

18. The Joint Intervenors contend that access to these agreements is an integral component of Qwest’s compliance with Section 271 (c)(2)(B)(iii) and that the disputed issues that remain relating to such access must be considered and resolved before Qwest can be deemed to be in compliance with Checklist Item 3. *Id.*

19. In Colorado, it was agreed that CLECs would execute an Access Agreement (in lieu of the Quitclaim that is now appended to the Arizona SGAT of the record that was filed on July 21, 2000), although the precise content of the Access Agreement was not fully resolved. *Id.* at p. 3-4. In the Arizona SGAT, Qwest did not include any of the language relating to this Access Agreement. *Id.* Reference to the Access Agreement was included into the Multi-state SGAT filed by Qwest and should be incorporated into the Arizona SGAT. *Id.*

20. There are several disputed issues with respect to the Access Agreement. *Id.* at p. 4. While Qwest has agreed to provide CLECs with all copies of its ROW and MDU agreements, Qwest seeks to impose significant conditions that the CLECs must comply with before such agreements will be provided. *Id.* Qwest has proposed terms and conditions in the Access Agreement that require CLECs to go through the unnecessary and burdensome effort of gaining 1) the landowner's consent before access to the agreements will be afforded, in cases where the underlying agreement has not been recorded and 2) the landowner's agreement to provide notice and opportunity to cure before Qwest will afford CLECs access to ROW agreements. *Id.* at p. 4-5. These issues have gone to impasse in Colorado, Washington, Oregon and the Multi-state workshops. *Id.*

21. Qwest proposes to provide a copy of any ROW agreement in its possession that has not been recorded only after a CLEC has obtained the consent of the landowner to the disclosure of the ROW agreement. *Id.* at p. 8. CLECs argue that this consent requirement is not required by the law and is inconsistent with sound public policy. *Id.* Also, since such consent is not required of Qwest itself, or its affiliates, Qwest's consent proposals for CLECs are discriminatory, in violation of both state and federal law. *Id.* CLECs further argued that it would create unreasonable costs and impose significant delays on CLEC access to ROW and provisioning of service using such ROW, which would constitute a significant barrier to offering the tenants or other customers a competitive alternative. *Id.*

22. ROW agreements presented to CLECs in the workshops (including Qwest's own Agreement for New Multi-Tenant Residential Properties) do not explicitly require consent to the disclosure of the terms of the agreement to third parties, and do not explicitly require written and acknowledged prior consent. *Id.* at p. 8-9. Qwest's form agreement contains a restriction on assignment that prohibits the landowner, not Qwest, from assigning the contract. *Id.* Qwest's Form Agreement for New Multi-Tenant Residential Properties contains a provision that requires the landowner, not Qwest, to notify Qwest of a transfer of the subject property. *Id.* These agreements clearly contemplate that Qwest may assign ROW access without restraint. *Id.*

23. These agreements do not contain nondisclosure requirements. *Id.* at p. 9. Qwest's proposal creates a presumption that all such ROW agreements are confidential and subject to a prohibition against disclosure, which is inappropriate and imposes a needless burden on CLECs to obtain disclosure. *Id.*

24. Finally, Qwest's proposal does not address the issue of Qwest's obligation with respect to future ROW agreements. *Id.* at p. 10. In future ROW agreements that Qwest enters into, Qwest must be required to obtain a contractual provision that affirmatively allows the disclosure of these agreements to third parties without prior written consent. *Id.*

4. Cure of CLEC breaches

25. Qwest's requirement that CLECs obtain the agreement of the landowner to provide Qwest with notice and an opportunity to cure is unlawful, unnecessary and burdensome. *Id.* at p. 10. The law does not mandate that CLECs obtain an agreement from the landowner to provide Qwest with notice and opportunity to cure before Qwest must provide access. *Id.* at p. 11. Neither the Act nor the FCC's rules and orders impose any requirement for a CLEC to obtain the agreement of a landowner to provide notice and an opportunity to cure to Qwest or further agreement of a landowner for access to rights of way. *Id.* While Qwest asserts that this notice and opportunity to cure is required to protect Qwest's interests, CLECs state that there are numerous indemnification and liability provisions in the SGAT to protect Qwest in the event a CLEC acts or fails in a way that exposes Qwest to liability. *Id.* at p. 11-12.

26. Where Qwest demonstrates that certain ROW agreements expressly provide for obtaining the agreement of the landowner to provide notice and an opportunity to cure before permitting "assignment" or other transfer, the Joint Intervenors would not object to inclusion in the SGAT certain limited and reasonable provisions designed to obtain and expedite such landowner agreement wherever necessary. *Id.* However, such provisions must not be burdensome and must ensure that Qwest does not use its incumbent status to impose such landowner agreement requirements on landowners. *Id.* at p. 12-13.

27. CLECs also state that Qwest's consent and notice and opportunity to cure proposals are discriminatory because Qwest requires a CLEC to comply with obligations that are more burdensome to CLECs than to itself. *Id.* at p. 13.

28. Additionally, Qwest's argument ignores the fact that CLECs are similarly at risk of a "default" under ROW agreement by Qwest. *Id.* at p. 13. Qwest deems it unnecessary to require the agreement of the landowner to provide notice and opportunity to cure to the CLEC, nor does Qwest deem it necessary to expressly agree that CLEC can perform under the ROW agreement in the event of Qwest's default. *Id.* Qwest's proposal does not afford a CLEC any protection and such a proposal is discriminatory. *Id.*

29. Joint Intervenors stated that in the preliminary rulings on these issues, the administrative law judges in Washington and Oregon have both considered and rejected Qwest's requirements that CLECs obtain landowner consent before access to ROW and MDU agreements will be afforded. *Id.* at p. 14. For the same reasons as specified by these rulings, the Arizona Corporation Commission should reject Qwest's proposed consent and notice and opportunity to cure requirements and direct Qwest to provide CLECs with full and unconditional access to its ROW and MDU agreements. *Id.* at p. 17.

5. Large Request Response Time

30. Qwest seeks to limit its obligation to respond to requests for access to ROW beyond the 45-day time frame established by the FCC. *Id.* at p. 5. Joint Intervenor argued that Qwest must be required to grant or deny all requests for access to poles, ducts and rights-of-way within 45 days of the receipt of the request in order for the SGAT to be lawful. *Id.* at p. 20. In Section 10.8.4 of the SGAT, Qwest has proposed timelines for responding for requests for access to ROW that are contrary to the 45-day response established by the FCC. *Id.* In the SGAT filed in Arizona, Qwest proposes that it be permitted for large ROW requests to provide an initial response approving or denying a portion of the order no later than 35 days following receipt of the order and continue approval or denial on a rolling basis until it has completed its response to such order. *Id.* This proposal is contrary to law. *Id.* Under the Act, the FCC rules and relevant orders of the FCC, Qwest is required to respond to all requests for access to poles, ducts ROW within 45 days, and there is no basis for excepting large requests from any other request for access to poles, ducts, conduit or ROW. *Id.* Qwest's SGAT must be modified to require responses to all requests for access to poles, ducts and ROW within 45 days consistent with FCC Rule 1.1403. *Id.* at p. 21. Again, the administrative law judges in Washington and Oregon have considered and rejected Qwest's SGAT Section 10.8.4 and have enforced the 45-day response time found in the FCC Rule. *Id.* at p. 23. The Arizona Commission should reject Qwest's effort to alter its clear obligation under FCC Rules and Orders and direct Qwest to revise its SGAT to require it to respond to request for access by approving or denying such requests within 45 days of receipt of the request. *Id.* at p. 26.

c. Qwest Response⁶

1. Definition of "Ownership and Control"

31. The Joint Intervenor state that Qwest's definition of "ownership and control" is inappropriate and that the proper function of this definition is to determine whether Qwest has "ownership and control" to afford the Joint Intervenor *access* to Qwest's right-of-way, easement or other interest in property. *Id.* at p. 2. The Facilitator in the Multi-State proceeding struck a reasonable compromise on this issue that contains aspects of both the Qwest and AT&T proposed language. *Id.* at p. 3. The Facilitator determined that the SGAT should reflect instances in which "ownership or control" arises "by implication" under state law, and that the definition should not necessarily be based on Qwest's ability to receive compensation for providing access. *Id.* It was also determined that AT&T's proposed definition, also proposed in the Request to Supplement the Record, was too broad because it ignored that Qwest's access rights are defined by state law. *Id.*

⁶ Qwest's April 17, 2001 Response to AT&T's and WorldCom's Request to Supplement the Record Regarding Checklist Items 3, 7, and 10.

32. Qwest has agreed to implement the Facilitator's recommendation in the Multi-State proceeding, and neither Joint Intervenor opposes that language. *Id.* at p. 3. To resolve this issue in Arizona, Qwest will also agree to include the same language so long as no other Arizona CLEC objects. *Id.* Staff believes that this is a reasonable compromise and recommends adoption of the Multi-State recommendation.

2. Definition of "Rights of Way" - ROW

33. The Joint Intervenor's oppose the definition of right-of-way that Qwest proposed in the Multi-State proceeding in Section 10.8.1.3.1. *Id.* at p. 4. They claim, without any discussion or citation to a paragraph, that a ROW is not limited to "real property interests, as Qwest defines that term" and that the definition is somehow "not consistent" with the FCC's *MTE Order*. *Id.* Joint Intervenor's later seem to acknowledge the validity of Qwest's definition of a ROW when they state that "the ownership or control analysis that must be conducted under State law is to determine Qwest's ownership or control to afford the CLEC access to its *right-of-way, easement or other interest in property*". *Id.* Joint Intervenor's cryptic opposition to the definition of a ROW, which fails to cite any legal authority in support, does not meet their burden of proving that Qwest's Multi-State definition affects Qwest's compliance with Sections 251 and 271. *Id.*

3. Access to MDU Agreements

34. Qwest argued that there are two issues that are in dispute. First, even though it disagrees that the MDU agreements at issue convey a ROW", Qwest has agreed in other States to provide CLECs with copies of MDU access and ROW agreements Qwest has entered into with third-party property owners that convey a right of access to Qwest so that CLECs may determine if Qwest has access rights it may convey. *Id.* at p. 5. The Joint Intervenor's and Qwest disagree on whether a CLEC should be required to obtain the consent of the third-party property owner prior to Qwest's disclosure of non-recorded agreements, principally MDU agreements, and disagree on the uses to which those agreements could be put by the CLEC. *Id.*

35. On March 5, 2001, Qwest submitted a proposal in the subloop workshop that permits CLECs to obtain MDU agreements (with landowner consent) so long as the CLEC uses the agreements to make certain Checklist Item 3/subloop determinations and does not disclose the agreements to its marketing, sales, or product management personnel. *Id.* at p. 5.

4. Cure of CLEC breaches

36. Qwest proposed that CLECs obtain a landowner's consent to Qwest's notice of opportunity to cure defaults by CLECs or possible breaches by CLECs of the underlying right-of-way agreements as a condition of obtaining access to the right-of-way over which Qwest has ownership or control. *Id.* at p. 9. The Joint Intervenor's state that obtaining this notice and opportunity to cure is too burdensome for CLECs. *Id.*

Although Qwest disagrees with Joint Intervenor's claims, Qwest will delete the Consent Regarding Access Agreement form in Exhibit D that contained the notice and cure obligations. *Id.* Qwest has agreed to this change in the Multi-State proceeding and submitted revisions to Section 10.8 and other provisions of Exhibit D to delete references to that form. *Id.*

5. Large Request Response Time

38. The Joint Intervenor's state that the timeline Qwest proposed in its Arizona SGAT provides too much time for Qwest to respond to unusually large requests for access to poles, ducts, conduits, and rights-of-way and that FCC rules required Qwest to respond to a request, regardless the size and without exception, in 45 days. *Id.* at p. 10. Qwest does not believe a blanket 45 day response time for large requests is contemplated by the FCC's rules or decisions and moreover, such a blanket requirement is unreasonable because it is simply impossible to adequately and thoroughly respond to some large requests for access within 45 days. *Id.*

39. However, if the Commission believes that the schedule Qwest and Joint Intervenor's negotiated is insufficient to demonstrate Qwest's compliance with Checklist Item 3, as an accommodation to the Joint Intervenor's, Qwest will agree to amend the SGAT, consistent the conclusions reached in the Multi-State workshop, to include a presumption that Qwest will respond to pole, conduit, and right-of-way requests in 45 days. *Id.* The SGAT will permit Qwest to seek relief from that requirement on a case-by-case basis. *Id.*

40. In the Multi-State proceeding, AT&T still opposes this resolution, apparently asserting that there should be no exception to the 45-day rule. *Id.* at p. 11. Neither FCC rules nor the SGAT should require the impossible. If a CLEC submits a unusually large request for access, or legitimate circumstances prevent Qwest's meeting the 45-day deadline, Qwest should be given the opportunity to seek a waiver. *Id.* Since Qwest will have the burden of justifying the waiver, the Commission should accept this resolution as fully consistent with Qwest's Checklist Item 3 obligations.

e. Discussion and Staff Recommendations

1. Definition of "Ownership and Control"

41. With respect to the definition of "ownership and control", Qwest has agreed to implement the Facilitator's recommendation in the Multi-State proceeding, which Qwest claims neither Joint Intervenor opposes. Qwest states that its proposed definition was taken from the FCC's *Local Competition Order*⁵ and its recent order on access to multi-tenant environments that is very similar to what AT&T seeks herein. While AT&T opposed this language according to Qwest, the recent Multi-State Order

⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (Aug. 8, 1996) ("Local Competition Order").

reflects a revised version of Section 10.8.1.5 to which neither AT&T or WorldCom objected. The revised Section 10.8.1.5 reads as follows:

The phrase "ownership or control to do so" means the legal right, as a matter of state law, to (i) convey an interest in real or personal property, or (ii) afford access to third parties as may be provided by the landowner to Qwest through express or implied agreements, or through Applicable Rules as defined in this Agreement.

42. Staff has reviewed the language and finds it acceptable and to be a reasonable compromise between the language proposed by the Joint Intervenor and Qwest. Further, given Qwest's representation that no CLEC objects to this language, Staff recommends its adoption in Arizona. Further, to the extent there are other conforming amendments that need to be made to other provisions of Section 10 of the SGAT (Attachment 2 to Qwest's Response to AT&T and WorldCom's Request to Supplement the Record, Staff recommends that Qwest be required to include those as well. Finally, Staff recommends that Qwest be required to submit all of its revised SGAT language for review by the parties before it is approved.

2. Definition of "Rights of Way" – ROW

43. With respect to the definition of ROW, the Joint Intervenor opposes the definition of ROW that Qwest proposed in the Multi-State proceeding in Section 10.8.1.3.1. The Joint Intervenor argues that a ROW is not limited to "real property interests, as Qwest defines that term" and that the definition is "not consistent" with the FCC's *MTE Order*.

44. Qwest claims that the definition it proposed in the Multi-State proceedings draws almost verbatim from paragraph 82 of the *MTE Order*. Qwest further states that there has been no evidence provided by Joint Intervenor which would indicate that Qwest's proposed language is inconsistent with its obligations under Sections 251 and 271 of the 1996 Act.

45. Staff has reviewed Qwest's proposed language changes to Sections 10.8.1.3, 10.8.1.3.1, 10.8.1.2.1 and 10.8.1.3.1 set forth on page 23 of the Multi-State Facilitator's March 19, 2001 Report and believes that the changes proposed by Qwest should satisfy AT&T's concerns with the two additions which Staff has added in bold print. The revisions read as follows:

10.8.1.3 Rights of Way (ROW) – Where it has ownership or control to do so, Qwest will provide to CLEC, via an Access Agreement in the form of Attachment 4 to Exhibit D, access to available ROW for the purpose of placing telecommunications facilities. ROW includes land or other property owned or controlled by Qwest and may run under, on, above,

across, along or through public or private property or enter multi-unit buildings.

10.8.1.3.1 ROW means **access to private property owned or controlled by Qwest**, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on such real property; such property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-unit buildings.

10.8.1.2.1 The terms Duct and Conduit mean a single enclosed raceway for conductors, cable and/or wire. Duct and Conduit may be in the ground, may follow streets, bridges, public or private ROW or may be within some portion of a multi-unit building. Within a multi-unit building, duct and conduit may traverse building entrance facilities, building entrance links, equipment rooms, remote terminals, cable vaults, telephone closets or building riser. The terms Duct and conduit include riser conduit.

10.8.1.3.1 ROW means **access to private property owned or controlled by Qwest**, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on such real property; such property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-unit buildings. Within a multi-unit building, a ROW includes a pathway that is actually used or has been specifically designated for use by Qwest as part of its transmission and distribution network where the boundaries of the pathway are clearly defined either by written specifications or unambiguous physical demarcation.

46. Staff recommends that Qwest be required to modify Section 10 of its SGAT as set forth above. Staff recommends that Qwest be required to make conforming amendments to other Sections of the SGAT as necessary. Finally, Staff recommends that Qwest be required to submit any proposed SGAT language to the parties for review prior to its approval.

3. Access to MDU Agreements

47. With respect to access to MDU and other landowner agreements, on March 5, 2001, Qwest submitted a proposal in the subloop workshop that permits CLECs to obtain MDU agreements (with landowner consent) so long as the CLEC uses the

agreements to make certain Checklist Item 3/subloop determinations and does not disclose the agreements to its marketing, sales, or product management personnel.

48. Staff agrees with the Seven-State Facilitator that "[i]t is evident why a CLEC should be allowed an independent determination of those rights, and why it should have access to these agreements." See March 19, 2001 Multi-State Report, at p. 21. Staff, however, believes requiring the CLECs to obtain approval of the landowner in all instances before the CLEC may obtain a copy of the underlying right of way or other landowner agreement is an unreasonable burden on the CLEC. Qwest should be required to eliminate the requirement for prior landowner approval before disclosure of underlying landowner/right of way agreements.

4. Cure of CLEC Breaches

49. Regarding cure of CLEC breaches, Qwest has agreed to delete the Consent Regarding Access Agreement form in Exhibit D that contained the notice and cure obligations. Qwest has agreed to this change in the Multi-State proceeding and submitted revisions to Section 10.8 and other provisions of Exhibit D to delete references to that form. With that change proposed by Qwest, Staff considers this issue now closed.

5. Large Request Response Times

50. Regarding AT&T's and MCIW's concern that the timeline Qwest proposed in its Arizona SGAT provides too much time for Qwest to respond to unusually large requests for access to poles, ducts, conduits, and rights-of-way, Qwest has agreed to amend the SGAT, consistent with the conclusions reached in the Multi-State workshop, to include a presumption that Qwest will respond to pole, conduit, and right-of-way requests in 45 days. *Id.* The SGAT will permit Qwest to seek relief from that requirement on a case-by-case basis. AT&T opposes this resolution.

51. Staff agrees with the CLECs. The FCC's rule and orders require a 45 day response period without any express exceptions. Particularly persuasive is the FCC's decision in the *Cavalier Telephone Company* case. In that case, the FCC's decision is clear that the number of poles requested does not alter the requirement to grant or deny access to poles, ducts or rights-of-way within 45 days. *Cavalier Telephone* at para. 15.

52. Staff recommends that Qwest be required to modify its SGAT to be consistent with the above resolution. Staff recommends that Qwest be required to submit its revised SGAT to all parties for review prior to approval.

II. CONCLUSIONS OF LAW

1. 47 U.S.C. Section 271 contains the general terms and conditions for BOC entry into the interLATA market.

2. Qwest is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. Sections 40-281 and 40-282 and the Arizona Commission has jurisdiction over Qwest.

3. Qwest is a Bell Operating Company as defined in 47 U.S.C. Section 153 and currently may only provide interLATA services originating in any of its in-region States (as defined in subsection (I)) if the FCC approves the application under 47 U.S.C. Section 271(d)(3).

4. The Arizona Commission is a "State commission" as that term is defined in 47 U.S.C. Section 153(41).

5. Pursuant to 47 U.S.C. Section 271(d)(2)(B), before making any determination under this subsection, the FCC is required to consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c).

6. In order to obtain Section 271 authorization, Qwest must, inter alia, meet the requirements of Section 271(c)(2)(B), the Competitive Checklist.

7. Checklist Item No. 3 requires Qwest to provide "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."

8. Qwest's provision of access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224 is no longer subject to dispute.

9. Based upon the testimony, comment and exhibits submitted, Qwest complies with the requirements of Checklist Item No. 3.